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In the Supreme Court of the United States

OCTOBER TERM, 1975

PACIFIC MARITIME ASSOCIATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The decision and order of the National Labor Relations Board are reported at 208 NLRB 994 (Pet. App. iii-xxii).[1]

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[1] The decision of the administrative law judge, which the Board adopted with modifications, was reprinted in the three-

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1975 (Pet. App. i-ii). Petitions for rehearing were denied on August 11, 1975 (Pet. 2). The petition for a writ of certiorari was filed on November 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that certain supplements to the collective bargaining agreement between Pacific Maritime Association (PMA) and the International Longshoremen's and Warehousemen's Union (ILWU) were designed to enlarge work opportunities for employees in the PMA-ILWU unit, rather than to preserve or reclaim work of that unit, and thus violated Section 8(e) of the National Labor Relations Act (the Act).

2. Whether the Board properly found that ILWU and certain of its Locals violated Section 8(b)(4)(B) of the Act by enforcing the 1970 Container Freight Station Supplement with an objective of forcing or requiring PMA and its members to cease doing business with California Cartage Company, Inc.

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volume appendix filed in the court of appeals (I Vol. 27-55). We have lodged copies of these volumes with the Clerk of this Court.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 3-4.

STATEMENT

A. The Board's Findings of Fact

1. *Background*

Petitioner Pacific Maritime Association is an association of companies engaged in marine shipping, marine terminal operations and stevedoring on the West Coast. PMA bargains on behalf of its members with petitioner International Longshoremen's and Warehousemen's Union, the bargaining representative of the longshoremen and marine clerks, whose traditional work is to load and unload incoming and outgoing ships for PMA members (ALJ 7-8; GCX 2, paras. 11, 12, 14, GCX 2-I(10), GCXs 2-A, 2-B; Tr. 378-381, 394-396, 757-758, 930, 940-1015, 1137-1139, 1148, 1275).[2]

Before World War II, most cargo handled by longshoremen was in so-called "break bulk" form—that

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[2] "ALJ" refers to the findings of the administrative law judge; "Tr." refers to the transcript of the hearing before the administrative law judge; "GCX" refers to the General Counsel's exhibits; "PMAX," "Cal Cart X" and "PMTX" refer to the exhibits of PMA, California Cartage and Pacific Motor Trucking, respectively. These materials are reprinted in the three-volume appendix filed in the court of appeals, copies of which have been lodged with the Clerk of this Court (see n. 1. *supra*).

is, it was delivered and deposited on the dock by truckmen in loose boxes or bundles and then individually loaded onto wooden pallets or into slings by longshoremen, hoisted onto the ship, removed from the pallet or sling, and stowed below deck (ALJ 12; Tr. 669-671, 1275, 1290-1297). Following World War II, cargo was "unitized" on pallets with either steel bands or glue, so that it remained on the pallet during the voyage and was redeposited on the dock at the end of the voyage on the same pallet (ALJ 12). Prior to 1960, however, ILWU insisted that truckmen (whose traditional work was to deliver cargo to, and pick it up from, the docks (ALJ 12; Tr. 521, 577, 670, 768-769, 1211-1213)) remove the freight from the pallets delivered by them and place it on the "skin of the dock," where it was "repalletized" by longshoremen and loaded aboard ship (ALJ 12; Tr. 520-521, 577).

In addition, some freight was shipped in large, self-contained receptacles. These containers were brought to the docks by truckmen, loaded intact by longshoremen, and, after the voyage, unloaded by the longshoremen and delivered intact to the consignees at the dock. At first, the growth of "containerization" was inhibited by the lifting capacity of dockside hoisting equipment as well as by certain ILWU-imposed restrictions on the maximum load which could be lifted per hoist (Tr. 976, 1349). But, with the advent of more powerful hoisting equipment in the 1950's, larger containers were introduced. The work of filling and removing freight from these containers was

done either by the employees of the consignor or the consignee, or by the employees of the trucking companies, who did the work for their various customers, including shipping lines. Longshoremen filled containers at the docks only when cargo was brought there in "break bulk" form. (ALJ 12; Tr. 100, 105, 109, 421, 647-657, 722-730, 779-783, 820-821).

These technological changes, and the concomitant loss of work for longshoremen, caused a decade of stormy labor relations in the shipping industry on the West Coast (Tr. 1361-1362). The problems did not end until 1960, when PMA and ILWU executed the Modernization and Mechanization Agreement. In exchange for a multimillion dollar payment by PMA into a pension-retirement-unemployment fund, ILWU eliminated its "make work" practices and its artificial restrictions on the size of loads, and authorized PMA to introduce new methods and equipment on the docks, over which ILWU was awarded jurisdiction (Pet. App. vi; ALJ 10; GCX 2-G(14), Tr. 1155-1157, 1341-1342, 1349). The Modernization and Mechanization Agreement was incorporated ultimately into the Pacific Coast Longshore and Clerks' Agreement (PCLCA), the parties' collective bargaining contract (ALJ 10; GCX 2-G(14), para. 52; Tr. 1155).

During the ensuing decade, as a result of the Modernization and Mechanization Agreement, cargo delivered by truck on pallets suitable for lifting di-

rectly aboard ship was not repalletized by longshoremen. Moreover, the practice of delivering cargo to the docks already crated or containerized became more prevalent. These containers were filled either by employees of the manufacturer, the consignor, or their trucking company, and once they were delivered to the dock by truckmen, longshoremen loaded them aboard ship without disturbing their contents. (Pet. App. vii; ALJ 10; GCX 2-G(14), paras. 1, 6; Tr. 1157, 1212-1214, 1349.) But, as in the past, when loose cargo was delivered to the docks, longshoremen placed it on pallets or put it into containers (GCX 2-G(14), para. 16; Tr. 1086-1087).

Modern containers are 8 feet wide and 8 feet high, range in length from 20 to 40 feet, and are capable of holding 10 or more tons of cargo (PMAXs 13, 15, 16; Tr. 270, 448, 941-942, 1052-1054, 1103). Special facilities, including off-dock container freight stations, were built and staffed to accommodate these containers. The off-dock container freight stations—where containers are filled with cargo prior to shipping or emptied after shipment and prior to delivery to the consignee—were operated by non-PMA members and manned by non-longshoremen, usually represented by the Teamsters Union (GCX 2-C, Sec. 1.12; Tr. 113, 433-434, 117-118).

Pacific Motor Trucking Company (PMT) performs container freight station services in the Los Angeles area for several PMA-member shipping lines. PMT employs 25 persons, represented by the Teamsters

Union, to fill and empty containers (ALJ 9, 13; GCX 2, PMTXs 1, 2; Tr. 433-436, 438-439, 448, 450-451, 604, 606, 609, 617, 629, 1336). California Cartage Company (CCC) operates a container freight station a few miles from the San Pedro docks, where it fills and empties containers for several PMA-member shipping lines who use the Los Angeles Container Terminal. CCC's 70 to 75 freight station employees are also represented by the Teamsters Union (ALJ 8-9; GCXs 2-D, 2-E, 2-F; Tr. 81, 113, 114, 117, 125, 127, 129, 130, 1019).

2. *The 1970 Container Freight Station Supplement and ensuing events*

The 1966-1971 PCLCA did not contain any provisions relating to the work performed at container freight stations. On January 5, 1970, ILWU and PMA executed the 1970 Container Freight Station Supplement to that agreement, which purported to bring the filling and emptying of containers at the container freight stations within the scope of the collective bargaining contract.[3] The 1970 Supplement also established two new job classifications for the work performed at container freight stations—with wages, hours and working conditions different from those specified for longshoremen under the PCLCA—and barred the transfer of workers at the container

[3] The 1970 Container Freight Station Supplement provided that "[t]he stuffing and unstuffing [filling and emptying] of containers in a Container Freight Station [CFS] * * * is work covered by this supplement" (ALJ 11; GCX 2-C, Sec. 1.1).

freight stations to longshore duties (GCX 2-C, Secs. 1.22, 1.23, 1.24, 4, 6). The expressed purpose of the 1970 Supplement was "to have all container work brought to CFS [container freight stations] on the dock or in areas adjacent to the dock on or before June 30, 1971" (GCX 2-C, Sec. 1.5). The 1970 Supplement also provided that no PMA member was to "renew, extend or execute new subcontracts for CFS work" after the expiration of a six-month transition period (GCX 2-C, Sec. 1.51). In short, the effect of the 1970 Supplement was to require all filling and emptying of containers loaded or unloaded from ships docked in ports on the West Coast, except for shippers' loads and door-to-door deliveries,[4] to be performed at the docks by employees represented by ILWU (Pet. App. ix).[5]

[4] A door-to-door delivery, like a shipper's load, refers to a container that has been filled by a single manufacturer or owner-consignor, generally at a point a considerable distance from the harbor or port, and is loaded directly aboard the ship and moved directly to the purchaser or consignee (ALJ 11, n. 10). Unlike shippers' loads, however, the responsibility for pickup or deliveries under the door-to-door method lies with the ocean carrier (GCX 3-A, Sec. 1.531(f); Tr. 879, 883, 1355).

[5] The restrictive portions of the 1970 Supplement read as follows (GCX 2-C):

> 1.532 The Employers agree that containers utilized by a steamship company for its own convenience will be unstuffed by men working under this Contract Supplement or under the Pacific Coast Longshore Contract Document.
>
> 1.534 The Employers agree that outbound cargo not shippers' loads will be stuffed or containerized by men working under this Contract Supplement or under the Pacific Coast Longshore Contract Document, except that for a period of six (6) months following the date this Contract Supplement is placed in effect, PMA member companies will be permitted to accept full containers from consolidators and put them aboard ship. The Employers will keep a daily log of such shipments during the six-month period and at the end of the period review with the Union the volume of cargo so handled. If it is determined that the practice involves a minimal number of containers, the Employers will be permitted to continue. Or if it is established that the volume is appreciable, the parties will review this item only and endeavor to reach agreement as to its disposition.

On June 14, 1971, about two weeks before the six-month transition period provided for in the 1970 Container Freight Station Supplement was due to expire, ILWU informed its various locals by letter that "all containers not stuffed [filled] by the registered work force will not be loaded aboard ship after 12:01 a.m., June 30, 1971," unless they were excepted shipments. The same letter appeared in the official ILWU publication sent to its locals and their members. On or about June 24, 1971, petitioner Local 13 published an article in its publication stating that "the program of not working containers on June 30, 1971—other than those stuffed or unstuffed by longshoremen, and the exceptions outlined in the contract, is still in effect" (ALJ 18-19; GCX 2, paras. 7-9).

On June 29, 1971, the president of Local 13 and the vice president of petitioner Local 63 told their respective members employed at the Los Angeles

Container Terminal that they were not to accept or handle containers filled, or to be emptied, by non-ILWU personnel, unless the containers were shippers' loads. The night stevedore superintendent at the Los Angeles Container Terminal also was informed of these instructions. The following morning, CCC's vice president was informed by officials of Local 63 that a container filled by employees of CCC bound for PMA-member Mitsui could not be accepted at the Los Angeles Terminal in accordance with the 1970 Container Freight Station Supplement. When CCC requested the manager of the Los Angeles Terminal to order the marine clerk to accept the container, the manager indicated that the longshoremen would strike if he gave that directive. CCC then returned the Mitsui container to its off-dock freight station and has not attempted subsequently to deliver to the Los Angeles Terminal any containers filled by its employees. A similar refusal to handle occurred the same morning when CCC attempted to pick up an inbound container at another PMA facility. (ALJ 11, 19-20; Tr. 133-141, 143, 349, 355-360, 411-418.)

On approximately February 10, 1972, after an economic strike by ILWU had been enjoined under the national emergency provisions of the Labor-Management Relations Act, PMA and ILWU executed a memorandum of understanding, effective to July 1, 1973, which revised and renewed the 1966-1971 PCLCA, which had expired. The memorandum of understanding included, in modified form, the terms

of the 1970 Container Freight Station Supplement (Tr. 1130). The amended Supplement provided, *inter alia*, for a $1.00 per ton tax on all containers filled or emptied by non-ILWU labor within 50 miles of each port, with certain exceptions, and mandated that all containers originating in or destined for delivery within that area, which were shipped on a non-PMA member vessel, were to be filled or emptied by ILWU members (ALJ 11; GCX 3-Appendix A, Secs. 1.54, 1.55).

B. The Decisions Below

Upon the foregoing undisputed facts, the Board, in substantial agreement with the administrative law judge, concluded that petitioners had violated Section 8(e) of the Act by entering into the 1970 and 1972 Container Freight Station Supplements and that ILWU and its Locals 13 and 63 had violated Section 8(b)(4)(B) of the Act by refusing to handle containers filled, or to be emptied, by CCC employees (Pet. App. xv). The Board found that petitioners were not attempting by these agreements to preserve or reclaim the work of filling and empting cargo in modern containers for ILWU-represented longshoremen, but rather were seeking to enlarge the work opportunities for employees in the PMA-ILWU bargaining unit (Pet. App. ix-xv). The Board ordered petitioners to cease and desist from such unfair labor practices, to notify their members that they have no objections to their handling containers filled or to be

emptied by non-ILWU members, and to notify members that the 1970 and 1972 Container Freight Station Supplements are void and unenforceable (Pet. App. xv-xxii).

The court of appeals enforced the Board's order, concluding that the Board's findings and order were supported by substantial evidence on the whole record (Pet. App. i-ii).

ARGUMENT

In *National Woodwork Manufacturers Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act depends upon "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere [footnote omitted]." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful.

Under these principles, unions and employers lawfully may enter into agreements that prohibit subcontracting of work normally performed or "fairly claimable" by employees in the bargaining unit covered by a particular contract, because such provisions have the valid, primary purpose of protecting the jobs of the employees in that unit. See *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F.2d 709, 713 (C.A.D.C.). On the other hand, agreements that seek to acquire for the employees of the primary employer work that is " 'neither unit work nor fairly claimable as unit work' " (*Sheet Metal Workers, Local 223* v. *National Labor Relations Board*, 498 F.2d 687, 696 (C.A.D.C.)) are secondary in design and impact.[6] Such agreements are unlawful because they reach beyond the primary bargaining unit and affect work historically performed by employees of another employer in another work unit.

The basic question presented by the petition is whether the Board properly concluded that the 1970 and 1972 Container Freight Supplements, insofar as they required that filling and emptying of all containers (except shippers' loads and door-to-door deliveries) be performed by employees represented by ILWU, sought to enlarge the work opportunities for the PMA-ILWU bargaining unit, rather than merely to preserve dock work traditionally performed or fairly claimable by the employees in that unit. Such an issue, involving only the application of settled principles to the particular facts of this case, does not warrant review by this Court. As the facts sum-

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[6] In the *National Woodwork* case, *supra*, Mr. Justice Harlan, whose vote was necessary for the Court's decision, emphasized in a separate concurring opinion that that was "not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs." 386 U.S. at 648.

marized in the Statement (pp. 3-11, *supra*) show, moreover, the evidence relied upon by the Board fully supports its conclusions.

As noted, the traditional work of longshoremen has been to load and unload ships, and, to the extent they have filled containers at the docks, that work has been simply incidental to their primary functions. At no time prior to 1970 did any employees covered by the PMA-ILWU collective bargaining agreement render any container freight station services; until then, the container freight station work was performed exclusively by non-longshore employees. Indeed, as the Board found (Pet. App. vi-vii, xii), the ILWU in effect bargained away in 1960 any claim to this work by agreeing, in the Modernization and Mechanization Agreement, that the problem of employee displacement resulting from technological change would be met, not by continuing to restrict such change, but by substantial employer payments into a fund to be used for longshore employees' pension, retirement and unemployment benefits.

The terms of the Container Freight Station Supplements also demonstrate that both PMA and ILWU recognized that container freight station work is different from the unit work traditionally performed by longshoremen. Thus, the Supplements established new, discrete classifications—CFS Utilitymen and CFS Clerks—for those employees assigned to the off-dock container freight stations. The wages, hours and working conditions established for these new

classifications are significantly different from those applicable to the longshore and clerk employees governed by the PCLCA. Men who are not registered as longshoremen may acquire regular positions at container freight stations, although they would have no such privilege under the PCLCA. Separate seniority dates are also provided for the CFS Utilitymen and CFS Clerks, and their transfer to traditional longshore work is specifically prohibited (GCX 2-C, Secs. 1, 4, 6, 7).

On this record, the Board was fully warranted in concluding that the container freight station work is "'neither unit work nor fairly claimable as unit work.'" *Sheet Metal Workers, Local 223* v. *National Labor Relations Board, supra,* 498 F.2d at 696. Rather, it is separate and distinct from the work traditionally done by the PMA-ILWU bargaining unit employees at the docks.

The cases relied on by petitioners (Pet. 27-32; Supplemental Pet.) do not support their contention to the contrary. In *American Boiler Mfrs. Ass'n* v. *National Labor Relations Board,* 404 F.2d 547 (C.A. 8), certiorari denied, 398 U.S. 960, the court held that a union could lawfully strike to "reacquire, as well as preserve, [unit] work" (404 F.2d at 551); it made clear, however, that its conclusion did not extend to agreements "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated" (*id.* at 552). In *Meat and Highway Drivers, Local 710* v. *National*

Labor Relations Board, supra, the unit employees historically had performed on an exclusive basis the work sought to be recaptured (335 F.2d at 712, 714); the PMA-ILWU unit employees involved here have never exclusively performed the disputed container work and have never performed at all such work at facilities located off the docks.

In *Canada Dry Corp.* v. *National Labor Relations Board,* 421 F.2d 907 (C.A. 6), the disputed work was identical to the traditional work performed by unit employees (*id.* at 909); here, the container freight work claimed by ILWU is not identical to the principal work of the unit—the loading and unloading of cargo aboard ships. In *Humphrey* v. *International Longshoremen's Ass'n,* No. 75-441-N (E.D. Vir., decided September 30, 1975) (Supplemental Pet. App. i-xiv), the court found that the unit employees initially had performed the disputed work and that, despite a subsequent eight-year hiatus in their performance of that work, the "contract provisions in issue were intended and operate solely to preserve historical work practices" (Supplemental Pet. App. xiii); by contrast, the disputed work involved in the present case (the filling and emptying of containers at off-dock container freight stations) was not performed prior to 1970 by PMA-ILWU bargaining unit employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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